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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1397

SCHERER & SONS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 5-6) is reported at 370 F. 2d 12. The findings of fact, conclusions of law, and order of the Board (Pet App. 1-4; R. 77-101)[1] are reported at 147 NLRB 1442.

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[1] "R." refers to Volume I of the Transcript of Record; "J.A." refers to the Joint Appendix filed in the court of appeals.

JURISDICTION

The judgment of the court of appeals was entered on December 22, 1966 (Pet. App. 5), and a petition for rehearing was denied on April 13, 1967 (Pet. App. 25). The petition for a writ of certiorari was filed on May 17, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*) are set forth in the Appendix to the petition (Pet. App. 1).

QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that the employer abridged his employees' right to refrain from engaging in concerted activity by ordering and inducing them to seek a State court injunction against peaceful picketing by the union.

STATEMENT

A. The Board's Findings of Fact

Petitioner manufactures accessories for, and does cutting work on, garments produced by other manufacturers (R. 78; J.A. 401-402, 418). On March 23, 1960, Local 415, International Ladies' Garment Workers' Union, AFL-CIO, notified petitioner that it intended to commence picketing to advise petitioner's customers and the general public that petitioner was

doing work on union-made garments under conditions which were below union standards. The Union further asserted that its picketing would not have an object of unionizing petitioner's employees or obtaining recognition as their bargaining representative (R. 81; J.A. 240-241.) None of petitioner's employees were members of the Union or represented by any other labor organization (R. 81; J.A. 419-420).

Picketing began in front of petitioner's premises on or about March 26, with signs reading: "Scherer & Sons doing work on union garments without union contract, I.L.G.W.U., Local 415, AFL-CIO" (R. 81; J.A. 252, 442-443). Picketing was peaceful and no employees were appealed to or deterred from working by the pickets (R. 81-82; J.A. 121-124, 237). A few days later all of the employees attended a meeting on petitioner's premises to discuss the picketing. Although the meeting was held during working hours, none of the hourly rated employees lost any pay or was reprimanded for leaving work (R. 82-83; J.A. 452, 466, 516-518). Petitioner's president, Joseph Scherer, told the employees at the meeting that the purpose of the Union's picketing was to "get [them] to join the union" (R. 82-83; J.A. 252-253, 418).

Nellie Kitchens, who distributed work to the other employees and was highly regarded by petitioner's officers, acted as employee spokesman at the meeting (R. 82; J.A. 449-450, 465-466, 516-517). After the meeting, Kitchens requested one of petitioner's secretaries to telephone attorney Joseph Perkins, a member of the law firm retained by petitioner, and to

arrange for him to have the picketing stopped (R. 83; J.A. 520-521, 535-536). In 1959 Perkins had obtained two separate State court injunctions against picketing by the Union, one on behalf of petitioner and the other for the employees. At that time, petitioner's president had referred Kitchens to Perkins when she had requested the name of a labor lawyer. Perkins' secretary had assisted Kitchens in drafting a document, later signed by 47 employees, which had authorized Kitchens "to get a lawyer for all of us * * * to try and get rid of the pickets who are interfering with us and our bosses work." Although petitioner's attorneys ordinarily charge $50 per hour for their services, Perkins never billed the employees for representing them in their 1959 suit. Kitchens, however, had collected about $75 and had given it to Perkins (R. 83, 86-87; J.A. 20-27, 38-40, 55-67, 82-84, 501, 519, 522, 526-528, 557).

After requesting petitioner's secretary to call Perkins, Kitchens made a copy, in the secretary's office, of the 1959 employee authorization. She then circulated the authorization among the employees while they were at their work places, and they signed it (R. 83; J.A. 289, 520-525, 531, 536). In the meantime, Perkins directed his associate, Roy Schenerlein, to draft a complaint for filing in a State court. The complaint alleged, *inter alia*, that the employees were satisfied with their working conditions and that the Union was picketing in order to force them to join, and their employer to contract with, the Union, in violation of various State laws. The complaint further alleged that the picketing was

causing irreparable injury, and sought an injunction to restrain it (R. 84; J.A. 90-97, 473-474, 482, 492-493).

The next day Schenerlein went to petitioner's plant with a notary and told president Scherer he was there "to get the complaint signed" by the employees. Scherer asserted that it was "all right with him" and summoned Kitchens. Schenerlein gave the complaint to Kitchens and instructed her to have the employees read and attest to it (R. 84; J.A. 90-97, 473-474, 477-478, 482-483, 492-493). Kitchens then proceeded to one of the workrooms with the notary and an employee who acted as interpreter for the Spanish-speaking employees. On a signal from Kitchens, the employees left their work stations in groups and came to the workroom, where Kitchens explained to them that the purpose of the complaint was to "get rid of the pickets" and "the union too." Forty-eight of petitioner's 49 employees signed the complaint. Among them was foreman Nathan Kaufman, who admittedly was one of petitioner's supervisors (R. 84-85, 93; J.A. 90-99, 487, 512, 543, 545, 547-549, 555).

While the employees were signing the complaint, president Scherer approached employee Jill Clark at her work table and inquired whether she "had signed the paper." When Clark answered no, Scherer told her "to do it now." Julio Figueros, Clark's foreman, accompanied her to the table where the complaint was being signed. When Clark heard Kitchens explain that the purpose of the complaint "was to have the

pickets taken away and to keep the union out," she commented to Figueros that she "wanted to know more about it, because I didn't know anything about the union, good or bad, and that I would have liked to know some more about it." Figueros told her to "remember which side [her] bread was buttered on." Without reading the complaint, Clark signed it, because when "your boss tells you to do something, you do it" (R. 85-86; J.A. 569-576). Similarly, Seymour Scherer, petitioner's secretary-treasurer, approached employee Ann Thomas at her work place and asked her if she had "tak[en] care of the matter in the back." When Thomas said no, Scherer told told her to "do it now." Thomas then proceeded to sign the complaint (R. 86; J.A. 418-419, 577-579).

On about March 30, 1960, petitioner's counsel filed the complaint; subsequently, the State court enjoined the Union from picketing (R. 80; J.A. 100, 115-117, 128). Although petitioner's attorneys admittedly had rendered services to the employees worth $1000 or more, they never discussed fees with or billed the employees. Several employees contributed a total of $24 which covered a bond premium and certain filing costs. Attorney Perkins asserted first that "in this instance, I have worked for nothing," and then that "[w]e are looking to [the employees] who signed" for payment of "whatever the traffic will bear for right now" (R. 86-87; J.A. 288, 317, 460, 499-501, 556-565).

B. The Decisions of the Board and Court of Appeals

Upon the foregoing facts the Board found that petitioner had ordered and induced its employees to bring a State court suit to enjoin the Union's picketing. It concluded that, by such action, petitioner had interfered with the employees' right under Section 7 of the Act to refrain from engaging in concerted activity in opposition to the Union, and had therefore violated Section 8(a)(1) of the Act (Pet. App. 3; R. 92-95). The Board ordered petitioner, *inter alia*, to cease and desist from inducing its employees to restrain the Union from peacefully and lawfully picketing petitioner's premises, and from similarly interfering with their rights to engage, or to refrain from engaging, in concerted activities (Pet. App. 4; R. 98).

The court of appeals held that the evidence supported the Board's finding that petitioner had unlawfully induced its employees to restrain the Union's picketing, and enforced the Board's order, with modifications narrowing its scope (Pet. App. 5-6).

ARGUMENT

Section 8(a)(1) of the Act makes it an unfair labor practice for an employer to interfere with his employees' rights under Section 7, which include the right, not only to engage in, but to refrain from engaging in, "concerted activities for the purpose of collective bargaining or other mutual aid or protection." Thus, petitioner's employees had the right, free from employer interference, to take concerted

action in support of or in opposition to the Union's picketing, or to refrain from taking any concerted action at all.[2] By ordering and encouraging employees to sign a complaint seeking an injunction against the picketing, petitioner unlawfully interfered with that right, forcing its employees to take concerted action against the picketing. As the court below correctly concluded, the facts (summarized in the Statement, *supra*, pp. 2-6) fully support the Board's finding of employer instigation of the employee injunction suit.[3] In these circumstances, the decision by the court below was correct, and no issue warranting further review is presented.

Contrary to petitioner's assertion (Pet. 7-8), the Board's decision does not make it an unfair labor practice for an employer or his employees to obtain a State court injunction against union picketing al-

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[2] See *National Labor Relations Board* v. *Nu-Car Carriers, Inc.*, 189 F. 2d 756, 760 (C.A. 3), certiorari denied, 342 U.S. 919; *Edward Fields, Inc.* v. *National Labor Relations Board*, 325 F. 2d 754, 759-760 (C.A. 2).

[3] Thus, two employees were commanded by petitioner, under circumstances leaving "no alternative * * * but to comply" (R. 92), to sign a complaint which alleged their opposition to the Union's picketing. Moreover, petitioner gave the other employees "reason to understand" that "this was what they had to do" (R. 94). It allowed Nellie Kitchens, "undoubtedly * * * regarded by employees as the hand of management" (R. 95), "freedom of the plant" (R. 93) to secure employees' support during working hours and without loss of pay; an admitted supervisor participated in the signing of the complaint; and the counsel recommended by petitioner undertook representation of the employees without charging them any fee (*supra*, pp. 3-6).

legedly violative of State law.[4] Nothing in that decision makes it unlawful for either an employer or his employees to attempt to obtain such an injunction (see *Clyde Taylor Co.*, 127 NLRB 103, 109); the decision merely bars an employer from compelling or inducing his employees to institute such a State court suit. Nor is petitioner aided by the statement of the court below (Pet. App. 6) that petitioner did not interfere "with any organizational activity of its employees." The court made this statement in the context of eliminating from the Board's order the reference to employer interference with activities of other unions and with employee "self-organization" (Pet. App. 6); it was not suggesting, as petitioner contends, that petitioner's action had no effect on its employees' Section 7 rights—*i.e.*, that it did not abridge their right to refrain from engaging in concerted action against the Union.

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[4] Such suits, however, may be preempted by federal labor legislation. See *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236; *Retail Clerks Int'l Ass'n, Local 1625* v. *Schermerhorn*, 375 U.S. 96, 105.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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